Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.
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CASE AND COMMENT.

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Forfeiture of Corporate Stock.

Unquestionably there are multitudes of people in this country who own shares of stock which are subject to forfeiture by reason of defaults in payment of installments. In the vast number of corporations this is all the time true. Yet cases in the courts on this subject are not remarkably frequent. Probably most stockholders who are from time to time delinquent afterwards pay what they owe and continue their relation to their corporation. Nevertheless forfeitures have been enforced in a considerable number of cases, and the proportion of the English authorities to the American authorities is greater on this subject than on most others. In a note on this question in 27 L. R. A. 305, it is shown that the English cases constitute an important part of the law on this subject. While the authorities establish the proposition that there is no inherent power in a corporation to declare a forfeiture, it is doubtless true nearly everywhere that authority of this kind has been conferred by statute. In enforcing such forfeiture the courts proceed on the theory that the right is *strictissimi juris*. All provisions as to notice and procedure must be strictly complied with. Some interesting questions arise as to the right to redeem from a forfeiture. These generally depend on the validity of the forfeiture. Conflict has existed as to the effect of forfeiture on the personal liability of the stockholder. Some cases have proceeded on the theory that a forfeiture of shares was inconsistent with any further claims on the stockholder. But it seems reasonable to say, and other authorities make the distinction, that while this may be true of a literal forfeiture, it is not true of a so-called forfeiture which is made by a sale of the shares in the nature of a foreclosure of a claim against them. No more reason exists against holding the stockholder liable for a deficiency remaining on such a sale than for holding the mortgagor personally liable for a deficiency remaining unpaid on foreclosure of his mortgage. In two or three states at least the liability of a stockholder for such a deficiency is denied by following out the theory, now repudiated in most jurisdictions, that there is no personal liability of a subscriber to stock to pay assessments or calls thereon. But the doctrine, almost everywhere established now, holds that a subscription to stock includes a promise to pay lawful assessments or calls thereon; and this logically requires the subscriber in case the shares are sold for unpaid installments to pay any deficiency that may be left on such sale.

Another phase of the subject is as to the effect of forfeiture on a stockholder's liability to creditors. An attempt has been made in some cases to procure a forfeiture in the interest of the stockholder with the secret purpose of avoiding liability to creditors. It is needless to say that the courts do not permit this to be done. But a forfeiture in the interest of the corporation is held to dissolve the stockholder's connection with the company and terminate his liability to cred-

itors on the subsequently declared insolvency of the company. This has been held to be the case even as to debts contracted before the forfeiture. While the decisions on the subject do not seem frequent in our courts there is in reality a considerable body of law on this subject. But this can hardly fail to increase materially with the vast increase in corporate interests and questions of all sorts connected therewith.

Electrical Disturbances.

A very important addition to the subject of the conflicting rights of electric railway companies and telephone companies in the use of streets is made by the recent decision of the Supreme Court of Tennessee in Cumberland Teleph. & Teleg. Co. *v.* United Electric R. Co., 93 Tenn. 492, 27 L. R. A. 236. At first sight the case seems to be directly opposed to the decisions in other jurisdictions on this subject. In several of these cases the courts had held that a telephone company could not by the prior use of a street obtain a paramount right to such use as against a street railway company so as to prevent the latter from using a current of electricity necessary for its purposes, even if it destroyed the working of the telephone. On this ground they have denied the telephone company the right to an injunction against the operation of such a railway. Decisions to this effect were made in Cumberland Teleph. & Teleg. Co. *v.* United Electric Railway (C. C. M. D. Tenn.) 12 L. R. A. 544; Cincinnati Inclined Plane R. Co. *v.* City & Sub. Teleg. Asso. (Ohio) 12 L. R. A. 534; Hudson River Teleph. Co. *v.* Watervliet Turnpike & R. Co. (N. Y.) 17 L. R. A. 674. It seemed that such authorities as these had substantially settled the law in favor of the electric railways as against the telephones. But the new Tennessee decision makes some very interesting distinctions. While the other cases referred to were cases for injunction, the Tennessee case is a suit for damages to the telephone plant. The decision therein sustains the right of the electric street-car line to use the streets as an ordinary street use subject to which the telephone franchise was granted, and denies the right of the telephone company to recover for loss sustained from induction on account of parallelism of wires, but sustains its right to damages caused by conduction resulting from the use of the ground circuit by the street railway as a single trolley line, the effect of which was to charge the earth for half a mile on each side and beyond the limits of the streets with powerful currents of electricity. The result of the case was to make the street railway company liable for the cost of return wires for the telephone line, which it was obliged to substitute for the ground circuit, in addition to the damages caused by what was held to be an unnecessary conflict of poles and wires. The distinction between the damage caused by induction on account of parallel wires and that caused by conduction charging the earth outside the street limits, seems to be a new one in this branch of litigation. The judges of the court were not altogether agreed. Some dissented, and those concurring in the decision were not all agreed as to the ground of it. Nevertheless a majority sustained the decision on the grounds above mentioned.

The Income Tax Quietus.

The interest of most people in the income tax is probably not very great since the late decision by the United States Supreme Court on its rehearing. Nevertheless from a legal standpoint the case must have a very great interest. That the doctrine of the court for almost a century should be overthrown is a matter of no slight importance. We think a calm consideration of the opinions of the judges on the subject will lead to the conclusion that the present decision is logically compelled by the language of the Constitution itself. The only difficulty in reaching this decision lay in the fact that judges who were on the bench when the constitution was framed had taken a different view of its meaning. But the court finds a way to distinguish the case of Hylton *v.* United States, 3 U. S. 3 Dall. 171, 1 L. ed. 556, which was a tax on carriages, as being in reality an excise rather than a tax on property. Making all allowance for the difficulties of the case it is clear that the more the question was discussed the more evident it became that to make a definition of direct taxes which should exclude an income tax on property was practically impossible. The result we believe will be much more satisfactory from a purely legal standpoint than any other decision could have been.

Res Ipsa Loquitur.

The general rule requiring a plaintiff to prove his cause of action is not in reality contradicted by the application of the maxim *res ipsa loquitur*. As the very language of the maxim implies, the circumstances speak for themselves, and proof of them is proof also of what is fairly to be inferred from them. But the application of the maxim being by way of reasonable inference necessarily presents a matter on which minds may be expected to differ. It is for that reason a subject of much legal interest.

In the late Maryland case of Howser *v.* Cumberland & P. R. Co., 27 L. R. A. 154, the maxim was held applicable to the falling of cross-ties from a railroad car upon a person in a footpath beside the roadbed but not on the right of way. The court relies on both English and American authorities. Of the English cases one is the case of the fall of a barrel of flour from a window above a shop injuring a passer-by. Byrne *v.* Boadle, 2 Hurlst. & C. 722. Another is the fall of bags of sugar upon a customs officer while passing in front of a warehouse on a dock in the exercise of his duty. Scott *v.* London & St. K. Docks Co. 3 Hurlst. & C. 596. Another is the fall of a brick from a railway bridge hurting a person on a highway. Kearney *v.* London, B. & S. C. R. Co. L. R. 5 Q. B. 411. Still another is the fall of a packing case which was leaning against a wall, on the foot of a person who on entering a doorway was pushed out of the way by a servant watching the case. Briggs *v.* Oliver, 4 Hurlst. & C. 403.

Among the American cases relied upon by the Maryland court is Cummings *v.* National Furnace Co., 60 Wis. 603; where negligence was inferred from the tipping of a bucket used in unloading a vessel by which its contents were dumped upon a workman. Another called the leading American case is Mullen *v.* St. John, 57 N. Y. 567, 15 Am. Rep. 530, which was a case of the fall of walls of a building with no special storm or violence to cause it. These are evidence that the doctrine of this maxim has found a very considerable place. In Barnowski *v.* Helson (Mich.) 15 L. R. A. 33, the same presumption is applied to the fall of a roof which slipped or tipped while being raised by jackscrews. The annotation to that case covers three kinds of cases, viz., those of personal injuries, including injury to passengers, those of injuries to live stock by railway trains, and those of railway fires. The decisions on the last two divisions of the subject are in much conflict. As to the first, relating to personal injuries, there are a large number in substantial agreement on the presumption of a carrier's negligence when a passenger is injured although recognizing some limitations and exceptions to the rule. A very reasonable distinction seems to be that taken in Fleming *v.* Pittsburg, C. C. & St. L. R. Co., 158 Pa. 130, 22 L. R. A. 351, between injuries caused by an accident connected with the means and appliances of transportation and those otherwise caused.

The application of the maxim in general is manifestly a subject on which a great variety of circumstances may be involved and in which a slight change of circumstances may change the decision.

Index to Notes
IN
LAWYERS' REPORTS, ANNOTATED.

Book 27, Parts 2 and 3.

Mentioning only complete notes therein contained without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with Case and Comment for one year for one dollar.

Among the New Decisions.

American Common Law.

The existence of an American Common Law irrespective of any English law on the subject is recognized in Commonwealth *v.* Lehigh R. Co., 165 Pa. 162, 27 L. R. A. 231, sustaining the practice in Pennsylvania of rendering judgment by default by virtue of long-established usage sanctioned by statutory and judicial recognition.

Constitutional Law.

In striking conflict with the decisions in most jurisdictions it is held in Mauldin *v.* Greenville (S. C.) 27 L. R. A. 284, that an assessment on abutting owners of the cost of grading, paving, or otherwise improving public streets on the basis of supposed benefits is in violation of the constitutional provision against depriving a person of property except by the law of the land.

Jurisdiction.

A decree of a New York court attempting to charge alimony upon land in New Jersey is held in Bullock *v.* Bullock (N. J.) 27 L. R. A. 213, ineffectual as to such lands on the ground that the decree is purely *in personam*, and the New Jersey court refused to enforce the decree.

Malicious Injury.

Injury to a merchant's business by one who by threats constrains his own employés to refrain from trading with the former is held in Graham *v.* St. Charles Street R. Co. (La.) 27 L. R. A. 416, to be actionable under the Louisiana Statute that every act of man which causes damage to another obliges him through whose fault it happened to repair it.

Receivers.

The appointment of a receiver for a corporation on the application of minority stockholders is sustained in State, Independent Dist. Tel. Co. *v.* Second Judicial Dist. Court (Mont.) 27 L. R. A. 392, where an investigation was pending of charges of outrageous fraud against the minority.

A receiver of the property of a foreign corporation is held in Holbrook *v.* Ford, 153 Ill. 633, 27 L. R. A. 324, to obtain no title to debts from nonresidents, although in the ordinary course of business they would have been payable in that state, as the *locus* of the debt is the domicil of the corporation.

Corporations.

The doctrine that a corporation itself and its members may constitute an unlawful combination is applied to a milk exchange in Ford *v.* Chicago Milk Shippers Asso. (Ill.) 27 L. R. A. 298, and in People *v.* Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437.

Insurance.

Attendance by a physician within the meaning of a life insurance policy is held to be shown in White *v.* Providence Sav. L. Assur. Soc. (Mass.) 27 L. R. A. 598, where the insured went to the office of a physician, submitted to a physical examination, obtained a prescription and paid a fee therefor, and subsequently again consulted him.

Banks.

Sending a check by an indirect route is held in First Nat. Bank *v.* Buckhannon Bank (Md.) 27 L. R. A. 332, not to be negligence if it reaches its destination as soon as it would if sent direct, taking the full time allowed by law for mailing.

Carriers.

A condition in a bill of lading that the shipper shall insure the goods for the carrier's benefit is regarded in Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 27 L. R. A. 228, as falling within the rule which denies the validity of a contract to protect a carrier against its own negligence.

A passenger in a public carriage is held in Budd *v.* United Carriage Co., 25 Or. 314, 27 L. R. A. 279, not guilty of contributory negligence in jumping out when the team is running and kicking, if a person of ordinary prudence would take that course.

Railroads.

A statute compelling railroads to build cattle guards whenever land owners demand them is sustained in Birmingham M. R. Co. *v.* Parsons (Ala.) 27 L. R. A. 263, against the objection that it makes the land owner the sole judge of the necessity, on the ground that as the statute might require the company to construct them in every case it might make such condition.

Ferry.

The proximate cause of the drowning of a horse which breaks a defective guard rail on a ferry-boat when frightened by the whistle of a tug-boat, is held in Sturgis *v.* Kountz, 27 L. R. A. 390, to be the defect in the rail and not the whistle.

Original Package.

The drawing of a bung from a barrel of intoxicating liquors shipped from another state, to obtain a small quantity to be tested for the purpose of exercising an option as to rejecting the purchase, is held in Wind *v.* Iler (Iowa) 27 L. R. A. 219, not to destroy the nature of the original package.

Contracts.

An agreement to give notes and mortgage "in your usual form" on employing a broker to procure a loan is held in Peabody *v.* Dewey, 153 Ill. 657, 27 L. R. A. 322, not to bind the borrower to a provision in the broker's customary form for payment in gold as a part of the contract.

Suretyship.

The refusal to resort to security held by a creditor which was amply sufficient to pay his claim is held in Bingham *v.* Mears (N. Dak.) 27 L. R. A. 257, insufficient to release a surety on an appeal undertaking.

Waters.

An unusual question as to the use of waters is decided in Baltimore Brew. Co. *v.* Ramstead, 78 Md. 501, 27 L. R. A. 294, denying the right to discharge water brought to a brewery in large quantities on the surface of the ground so as to injure neighboring proprietors.

Charities.

A residuary bequest to certain churches according to the number of members, to buy coal for their poor, is held in Bird *v.* Merklee, 144 N. Y. 544, 27 L. R. A. 423, to be a direct gift to the churches and not a trust for unascertained or indefinite beneficiaries.

Voters and Elections.

A voter having a residence in a ward or election district in the sense of having no home anywhere else is held in Langhammer *v.* Munter (Md.) 27 L. R. A. 330, to have a residence sufficient for voting purposes, although there is no particular house in that ward which he can call home.

Master and Servant.

What is to be considered within the scope of a servant's employment is held in Ritchie *v.* Waller, 63 Conn. 155, 27 L. R. A. 161, to be generally a question of fact, but a very slight deviation from the strict course of his employment may be held as matter of law to be within the rule as to the master's liability for his negligence. In this case deviation by a servant driving a team from the usual course was held not to relieve the master.

But a railroad company is held in Houston, Central Ark. & N. R. Co. *v.* Bollings (Ark.) 27 L. R. A. 190, not to be liable for an injury to a child riding on a hand-car on invitation of its employés contrary to the company's rules.

The scope of employment of a servant leading a colt from a water tub to a yard is held in Bowler *v.* O'Connor (Mass.) 27 L. R. A. 173, not to extend to an invitation to a boy to ride the colt so as to make the master liable for the injury to the boy.

An engineer and fireman on a railroad locomotive are held in Texas & P. R. Co. *v.* Scoville, 62 Fed. Rep. 730, 27 L. R. A. 179, to be within the scope of their employment in maliciously and wantonly blowing the whistle to freighten a horse near the track.

The rule that a master must provide a safe place for workmen is held in Beesley *v.* F. W. Wheeler & Co. (Mich.) 27 L. R. A. 266, not to be applicable to the negligence of carpenters in preparing a scaffold for other workmen of the same employer.

The remedy of a servant wrongfully discharged is held in McMullan *v.* Dickinson Co. (Minn.) 27 L. R. A. 409, to include successive actions for successive installments of wages thereafter accruing.

Quoted from the Judges.

Judge Finch of the New York Court of Appeals says in a recent case: "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."

Judge Coxe in a Federal case, says: "There is no class of people so apt to deal in hyperbole as patentees and those expert in patent matters. If the gentlemen whose vocation it is to express opinions as to the value of patents were held pecuniarily responsible for every ill-founded statement, it is safe to infer that there would be a marked contraction either in the views or the incomes of a large number of mechanical experts.

"It is a matter of common knowledge that owners of patents do not usually understate their inventions or establish their own reputation for diffidence and modesty in their circulars to the trade."

Judge Caldwell says in another Federal case: "The assumption of the courts that jurors are so weak, ignorant, and inexperienced as to fall an easy prey to the arts of the unscrupulous counsel is a grave error. They are as little liable to be played upon by false logic and misrepresentations of the evidence as the judge on the bench. There is no occasion for a refining machine at their elbow to sift the false from the true in the

evidence or to detect chicanery, falsehood, or fallacy in the argument of counsel. The jurors are quite as able to protect themselves from such influences on the facts of the case as the court is on the law, and every ruling which proceeds upon the idea that juries are destitute of common sense, unacquainted with the affairs of the world, and ignorant of the arts and methods of lawyers, is unsupported by fact or experience."

In another Federal case the court says: "It is not infrequent that tired jurymen, who have listened to a trial of many days' duration, and who, with empty stomachs, are wrangling over a doubtful question of fact, without any prospect of agreement, are brought by a single meal into a condition of mind and body that enables them to calmly review the evidence, and to agree upon a just and fair verdict in a few hours."

An Illinois court reviewing evidence says: "Considering that the subject-matter is a matrimonial quarrel, in regard to which no exaggeration is generally too gross for use, the truth really lies at the bottom of a very deep well of very muddy water."

Specimens of Wills.

"In bee half of Louise." A testator provides that certain property shall remain while she shall pay $300 each "to the followin ares." He was evidently aided in preparing his testament by a local magistrate, who says: "I do hear by sertify that this is a true statement made be for me . . . I being a qualified justis of the peace."

Another will reads as follows:—"Crolldepdro, february 3, 1892, this is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis. Patrick Donohue."

Still another will provides for a remainder as follows:—"That after her Dead my beloved childern on their executor administrator shall divite the same chair and chair alike."

The Humerous Side.

PROFESSIONAL AGILITY.—A Rochester daily tells of an attorney who in making requests to charge and taking exceptions got his lists mixed. He said to the judge: "I except to your honor's charge" so and so. "But," said the judge, "I did not charge anything of the sort." "Then," said the attorney quite unabashed, "I ask your honor to charge it." "I decline," said the judge. "I except," said the attorney.

This ready shifting of position is almost as good as that in the old story of the Boston lawyers, father and son. This was to the effect that the son when going to his father's house and passing up the walk was attacked by a vicious little dog belonging to the older gentleman but with a kick sent the dog yelping to the house. Roused by the yelping the elder man came out in a passion and says, "What did you kick that dog for?" "He bit me," said the son. "He did not bite you," says the father. "I did not kick him," was the rejoinder.

A CHINESE OATH.—In an old English case a Chinese oath is described as follows: It appears that a witness taking a saucer in his hand which was cracked by him, the crier said, "You shall tell the truth, and the whole truth. The saucer is cracked and if you do not tell the truth your soul will be cracked like the saucer."

JUDICIAL NOTICE OF THE FUTURE.—In a late case it is said that the court will take judicial notice of the fact that long before the lease of a yacht for ninety-nine years falls in, the yacht will have fallen apart and the claimant will have taken his last boat-ride with Charon as "sailing-master."

JULY is the month to buy second-hand law books, reports and text-books. There are bargains at all times, but no such bargains as at that time. Publishers wish to unload stock for the summer and will sell at cost to do it. Here are samples from our summer clearance sale list. We have them all now, but there's danger if you delay. Send for the list.

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120

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